

APR 07 2015

## NOT FOR PUBLICATION

SUSAN M. SPRAUL, CLERK  
U.S. BKCY. APP. PANEL  
OF THE NINTH CIRCUITUNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT

In re: ) BAP No. CC-13-1567-DKiKu  
IRISON LOMONT JONES, ) Bk. No. 13-15206  
Debtor. ) Adv. No. 13-1502  
\_\_\_\_\_)  
BRETT JONES-THEOPHILIOUS, )  
Appellant, )  
v. ) **MEMORANDUM<sup>1</sup>**  
WESLEY HOWARD AVERY, CHAPTER 7 )  
TRUSTEE, )  
Appellee. )  
\_\_\_\_\_)

Submitted Without Oral Argument  
on April 2, 2015

Filed - April 7, 2015

Appeal from the United States Bankruptcy Court  
for the Central District of California

Honorable Peter H. Carroll, Bankruptcy Judge, Presiding

Appearances: Appellant Brett Jones-Theophilious, pro se, on  
brief.

Before: DUNN, KIRSCHER and KURTZ, Bankruptcy Judges.

<sup>1</sup> This disposition is not appropriate for publication.  
Although it may be cited for whatever persuasive value it may  
have (see Fed. R. App. P. 32.1), it has no precedential value.  
See 9th Cir. BAP Rule 8024-1.

1 This is an appeal by a pro se non-debtor incarcerated  
2 adversary proceeding defendant, Brett Jones-Theophilious  
3 ("Mr. Jones-Theophilious"). Mr. Jones-Theophilious is the  
4 brother of the debtor, Irison Lomont Jones ("debtor").<sup>2</sup> In the  
5 adversary proceeding, the chapter 7 trustee ("Trustee") obtained  
6 entry of default against Mr. Jones-Theophilious. Mr. Jones-  
7 Theophilious appeals the entry of default against him on the  
8 ground that the Trustee did not properly serve him with the  
9 complaint, the summons and the motion for entry of default.<sup>3</sup> We

---

11 <sup>2</sup> Unless otherwise indicated, all chapter and section  
12 references are to the federal Bankruptcy Code, 11 U.S.C.  
13 §§ 101-1532, and all "Rule" references are to the Federal Rules  
14 of Bankruptcy Procedure, Rules 1001-9037. All "Civil Rule"  
15 references as to the Federal Rules of Civil Procedure.

16 <sup>3</sup> Before the bankruptcy court issued its decision on  
17 Mr. Jones-Theophilious' motion to set aside the default, the  
18 Trustee filed a motion for entry of a default judgment against  
19 him. (In the unilateral status report filed by the Trustee on  
20 October 10, 2013, the Trustee claimed that the bankruptcy court  
21 directed him to file the motion for default judgment.) On  
22 November 8, 2013, the bankruptcy court entered an order denying  
23 Mr. Jones-Theophilious' motion to set aside the default and the  
24 default judgment against him.

25 On appeal, Mr. Jones-Theophilious seems to challenge both  
26 the entry of the default **and** the entry of the default judgment.  
27 To contest an entry of default, the aggrieved party must file a  
28 motion under Civil Rule 55(c), which allows the bankruptcy court  
to set aside a default for good cause shown. However, once a  
default judgment has been entered (as it was here), the party  
seeking relief must file a motion under Civil Rule 60(b). See  
Civil Rule 55(c) and Rules 7055 and 9024. See also Katzir's  
Floor and Home Design, Inc. v. M-MLS.com, 394 F.3d 1143, 1147 n.1  
(9th Cir. 2004) ("Once a default **judgment** has been entered . . .  
the aggrieved party must proceed under [Civil] Rule 60(b) to have  
the judgment set aside.") (emphasis in original).

Although Mr. Jones-Theophilious filed a motion to set aside  
(continued...)

1 AFFIRM.

2  
3 **FACTS**<sup>4</sup>

4 In or about October 2001, the debtor purchased his residence  
5 located in Lancaster, CA ("Lancaster Property"). In July 2002,  
6 he obtained a mortgage loan from Indymac Bank ("Indymac"),  
7 secured by a trust deed against the Lancaster Property.

8 The debtor defaulted on the loan. After a notice of default  
9 and election to sell was recorded, a trustee's sale was scheduled  
10 for April 16, 2010.

11 Between April 2010 and August 2010, the debtor transferred  
12 25% fractional interests in the Lancaster Property as "gifts" to  
13 three friends/family members, including his brother, Mr. Jones-  
14 Theophilious (collectively, "transferees"). When the debtor

15  
16 <sup>3</sup>(...continued)  
17 the default, as of March 30, 2015, he had not filed a motion to  
18 set aside the default judgment. We therefore address his motion  
19 to set aside the default only.

20 <sup>4</sup> Mr. Jones-Theophilious did not provide any documents or  
21 transcripts of hearings from the underlying adversary proceeding.  
22 Instead (as we describe in more detail below), he provided us  
23 copies of envelopes bearing his address and a copy of his expired  
24 driver's license.

25 Because we lack many of the relevant documents, we have  
26 exercised our discretion to reach the merits of the appeal by  
27 independently reviewing the bankruptcy court's electronic docket  
28 and the imaged documents attached thereto. See O'Rourke v.  
Seaboard Sur. Co. (In re E.R. Fegert, Inc.), 887 F.2d 955, 957-58  
(9th Cir. 1988); Atwood v. Chase Manhattan Mortg. Co.  
(In re Atwood), 293 B.R. 227, 233 n.9 (9th Cir. BAP 2003). We  
also have done our best to reconstruct what happened at the  
relevant hearings without the benefit of the missing transcripts.  
See Ehrenberg v. Cal State Fullerton (In re Beachport Entm't),  
396 F.3d 1083, 1087-88 (9th Cir. 2005).

1 transferred the 25% interest to Mr. Jones-Theophilious on  
2 April 15, 2010, Mr. Jones-Theophilious promptly filed a skeleton  
3 chapter 13 bankruptcy petition (case no. 10-24540-VZ). Because  
4 he failed to file the schedules, statement of financial affairs  
5 ("SOFA") and plan, the chapter 13 case was dismissed in early May  
6 2010.

7 On February 28, 2013, the debtor filed his chapter 7  
8 bankruptcy petition (main case no. 13-15206-SK). He converted  
9 his chapter 7 case to chapter 13 on May 27, 2014.

10 The debtor did not list the Lancaster Property in his  
11 original Schedule A. However, he claimed an exemption in the  
12 Lancaster Property in his original Schedule C and named Indymac  
13 as a secured creditor in his original Schedule D. The debtor did  
14 not mention Mr. Jones-Theophilious in any of his original  
15 schedules or in his SOFA. Although the debtor amended his  
16 Schedule A, Schedule C and Schedule D, including the Lancaster  
17 Property, he did not mention his or the transferees' alleged  
18 respective 25% interests in the Lancaster Property. He simply  
19 listed the Lancaster Property in his amended schedules, implying  
20 that he owned it 100%.

21 In April 2013, the Trustee began marketing the Lancaster  
22 Property for sale. Meanwhile, on May 7, 2013, he initiated an  
23 adversary proceeding against the transferees (adv. proc. no.  
24 13-1502-SK), asserting numerous claims for relief.<sup>5</sup>

---

26 <sup>5</sup> When the Trustee obtained an offer to purchase the  
27 Lancaster Property, he moved to sell it free and clear of liens  
28 under § 363(f) in January 2014. The bankruptcy court approved  
(continued...)

1        Among these claims for relief, the Trustee sought to enjoin  
2 the transferees from transferring their interests in the  
3 Lancaster Property and from filing further bankruptcy petitions.<sup>6</sup>  
4 He also sought to avoid as fraudulent the debtor's transfers of  
5 the fractional interests in the Lancaster Property to the  
6 transferees.

7        The Trustee also sought declaratory relief for various  
8 determinations, including that: 1) the bankruptcy estate owned  
9 the Lancaster Property; and 2) the transferees held no legal or  
10 equitable interests in the Lancaster Property. He also sought:  
11 1) to quiet title against the transferees; 2) turnover of the  
12 Lancaster Property; and 3) authority to sell the fractional  
13 interests in the Lancaster Property, including those of the  
14 transferees, to the extent that they were co-owners.

---

16        <sup>5</sup>(...continued)  
17 the sale, entering an order in February 2014 ("sale order"). The  
18 debtor appealed the sale order (BAP No. CC-14-1069) and requested  
19 a stay pending appeal. Both the bankruptcy court and the Panel  
denied the debtor's request for a stay pending appeal.

20        The debtor vacated the Lancaster Property, allegedly  
21 stripping it and doing \$100,000 in damages in the process. The  
22 sale fell through when the buyers withdrew their offer to  
purchase. The appeal of the sale order later was dismissed as  
moot on the Trustee's motion.

23        <sup>6</sup> On the same day he filed his complaint, the Trustee  
24 separately moved for a preliminary injunction and a temporary  
restraining order.

25        The bankruptcy court entered a temporary restraining order  
26 on May 8, 2013. It issued a preliminary injunction on May 22,  
27 2013, enjoining the transferees from transferring their  
fractional interests in the Lancaster Property. However, the  
28 bankruptcy court denied the Trustee's request to enjoin the  
transferees from filing for bankruptcy.

1 On May 8, 2013, the summons was issued, requiring the  
2 transferees to file their answers to the complaint by June 7,  
3 2013. On the same day, the Trustee filed a proof of service of  
4 the summons and the complaint. In the proof of service, the  
5 Trustee declared under penalty of perjury that, on May 8, 2013,  
6 he served Mr. Jones-Theophilious the summons and complaint via  
7 FedEx, next business day delivery, at his last known address.  
8 The Trustee listed the address as 793 Beatrice, Veguita, NM 87062  
9 ("793 Beatrice Address"). The Trustee filed a supporting  
10 Declaration on the following day.

11 On June 13, 2013, the Trustee filed a request for entry of  
12 default against Mr. Jones-Theophilious and the other transferees  
13 for failing to file any answer or responsive pleading to the  
14 complaint by the June 7, 2013 deadline. A notice of entry of  
15 default was entered on June 14, 2013. The certificate of notice  
16 reported that the notice of the entry of default had been sent by  
17 first-class mail by the Bankruptcy Noticing Center ("BNC") to  
18 Mr. Jones-Theophilious at the 793 Beatrice Address.

19 On July 11, 2013, the Trustee filed a status report stating  
20 that: 1) all of the transferees had been served with the  
21 complaint and the summons; 2) none of the transferees had filed  
22 answers to the complaint; and 3) default had been entered against  
23 all of the transferees on June 14, 2013. He further disclosed  
24 that he was in the process of preparing a request for entry of a  
25 default judgment against the transferees.

26 The status report included a proof of service. Notably, the  
27 status report proof of service listed two addresses for  
28 Mr. Jones-Theophilious, the 793 Beatrice Address and the

1 following address: Prisoner Reg. No. 41299-069, FDC Detention  
2 Center-Miami, Attn: Legal Documents, P.O. Box 019120, Miami, FL  
3 33101. A status hearing was set for August 8, 2013, but was  
4 continued to October 24, 2013.

5 On July 17, 2013, Mr. Jones-Theophilious filed a  
6 declaration, which essentially was an answer to the complaint.<sup>7</sup>  
7 Among his various arguments, Mr. Jones-Theophilious contended  
8 that, as he had "received a package on 6-22-13 regarding this  
9 matter, any hearing prior to that date [was] undue surprise, as  
10 process had not been perfected."

11 Two days later, Mr. Jones-Theophilious filed a motion to set  
12 aside the default ("First Motion to Set Aside Default"). In the  
13 First Motion to Set Aside Default, he claimed that he had "just  
14 received" the complaint and the summons in late June or early  
15 July 2013. He contended that the default against him should be  
16 set aside because the Trustee failed to serve the complaint and  
17

---

18 <sup>7</sup> The declaration was filed by a Brett Bin Isaac/Brett  
19 Jones. At the top left-hand corner of the declaration was this  
20 hand-written notation: "Ronald West (310) 466-7519." (The  
21 bankruptcy court clerk listed Mr. West as the filer of the  
22 declaration on the adversary proceeding docket.) Below the  
hand-written notation was the following text: "Brett (Counsel),  
P.O. Box 393, New Mexico, Veguita."

23 At the outset of the declaration, Brett Bin Isaac  
24 represented that he was "the Executor for the ESTATE 'BRETT  
25 JONES-THEOPHILIOUS ESTATE/TRUST.'" He further stated that "BRETT  
26 JONES-THEOPHILIOUS is an unincorporated foreign corporation . . .  
and under law is a legal entity and individual, not a natural  
person." Also, the declaration ended with "Brett Jones 1-308,  
3-415 without recourse, all rights reserved."

27 Based on these statements, we deduce that Mr. Jones-  
28 Theophilious had written the declaration and presumably filed it  
through Mr. West.

1 summons properly on him by sending them through "regular mail,"  
2 which was "not in compliance with Service of Process Rules."  
3 Mr. Jones-Theophilious also informed the bankruptcy court of his  
4 incarceration.<sup>8</sup>

5 On September 30, 2013, he filed another motion to set aside  
6 the default ("Second Motion to Set Aside Default"). In it,  
7 Mr. Jones-Theophilious argued that the Trustee failed to serve  
8 the pleadings properly, which rendered the default entered  
9 against him invalid. He further claimed that the bankruptcy  
10 court lacked jurisdiction because of the Trustee's improper  
11 service of the pleadings.

12 Mr. Jones-Theophilious also alleged that the bankruptcy  
13 court knew that he was in transit between prisons but failed to  
14 ensure that he was served properly. He urged the bankruptcy  
15

---

16 <sup>8</sup> Along with the First Motion to Set Aside Default,  
17 Mr. Jones-Theophilious filed a declaration, which essentially was  
18 an amended or further answer to the complaint. See adv. proc.  
19 docket no. 25. In it, he made a number of allegations, including  
20 that: 1) Indymac lacked standing and did not have a valid claim  
21 to the Lancaster Property because the promissory note had been  
22 sold; 2) the Lancaster Property was covered by mortgage default  
23 insurance; and 3) the bankruptcy court did not have subject  
24 matter jurisdiction.

25 He also filed other documents, including: 1) a  
26 "declaration," titled "Official Laws of the United States and  
27 P.L. 73.10, The Banking Act of 1933, #2 Stat. Ch. 48 (June 5, 6  
28 1933 Act, 12 U.S.C. 411, 412," which set forth additional  
arguments against Indymac; 2) an "affidavit," titled "Affidavit  
Maxim, Assets, 'Show Me the Original Note,' Proof of Payment in  
Full, Right to Counter and Discovery," which set forth more  
arguments against Indymac, as well as a request for discovery;  
and 3) an "affidavit," titled "Reminder of Rules, as well as  
Secured Right," which informed the bankruptcy court that he was  
in transit, presumably between prisons.



1 court to hold a hearing on his motions.

2 Mr. Jones-Theophilious included a change of address in his  
3 Second Motion to Set Aside Default. He listed his new address as  
4 P.O. Box 2005-41299069, Catano, Puerto Rico 00963.

5 The Trustee filed a response, contending that Mr. Jones-  
6 Theophilious failed to show good cause to set aside the default.

7 On November 8, 2013, the bankruptcy court entered an order  
8 denying the Second Motion to Set Aside Default.<sup>9</sup> It determined  
9 that Mr. Jones-Theophilious failed to demonstrate good cause for  
10 setting aside the default pursuant to Civil Rule 55(c) in that he  
11 did not provide any evidence showing: 1) that he did not engage  
12 in the culpable conduct that led to the default; or 2) that he  
13 had a meritorious defense to the Trustee's claims. The  
14 bankruptcy court also pointed out that it had determined earlier  
15 that the Trustee had properly served the complaint and summons on  
16 Mr. Jones-Theophilious at his address of record.<sup>10</sup> A default  
17 judgment in favor of the Trustee and against Mr. Jones-  
18 Theophilious was entered on November 8, 2013.<sup>11</sup>

19 Mr. Jones-Theophilious appealed.  
20

---

21 <sup>9</sup> On the same day, the bankruptcy court entered an order  
22 granting the Trustee's motion for entry of a default judgment.  
23 It determined that the Trustee timely and properly served the  
24 transferees and that the transferees failed to oppose the entry  
of a default judgment.

25 <sup>10</sup> The bankruptcy court ordered the Trustee to serve  
26 Mr. Jones-Theophilious at the Puerto Rico prison address.

27 <sup>11</sup> On November 9, 2013, the Trustee filed a notice of entry  
28 of the default judgment against the transferees. The proof of  
service listed all three addresses for Mr. Jones-Theophilious.

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 0
- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 0
- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8

**ISSUE**

Did the bankruptcy court abuse its discretion in denying Mr. Jones-Theophilious' Second Motion to Set Aside Default?

## STANDARDS OF REVIEW

However, we review de novo the bankruptcy court's

determination that service of process was sufficient. Rubin v. Pringle (In re Focus Media, Inc.), 387 F.3d 1077, 1081 (9th Cir. 2004).

We may affirm the bankruptcy court on any ground supported by the record. See ASARCO, LLC v. Union Pac. R. Co., 765 F.3d 999, 1004 (9th Cir. 2014); Shanks v. Dressel, 540 F.3d 1082, 1086 (9th Cir. 2008).

### DISCUSSION

Civil Rule 55, made applicable in bankruptcy proceedings through Rule 7055, provides that a default may be entered against a party when that party fails to plead or otherwise defend an action. Civil Rule 55(a). Under Civil Rule 55, the bankruptcy court has "considerable leeway as to what it may require as a prerequisite to the entry of a default judgment." Televideo Sys., Inc. v. Heiddenthal, 826 F.2d 915, 917 (9th Cir. 1987). Where a default has been entered, the bankruptcy court should accept as true all allegations in the complaint, except those relating to damages. Id. at 917.

"The determination as to whether a default . . . shall be set aside rests in the sound discretion of the trial court." Madsen v. Bumb, 419 F.2d 4, 6 (9th Cir. 1969) (citations omitted). Under Civil Rule 55(c), the bankruptcy court may set aside an entry of default for good cause. To determine whether good cause exists to set aside a default under Civil Rule 55(c), the bankruptcy court must consider three factors: 1) whether the defaulting party engaged in culpable conduct that led to the default; 2) whether the defaulting party had no meritorious

1 defense; or 3) whether reopening the default judgment would  
2 prejudice the other party ("Civil Rule 55(c) factors"). Mesle,  
3 615 F.3d at 1091. "This test is disjunctive, such that a finding  
4 that any one of the factors is true is sufficient for the court  
5 to refuse to set aside the default." Id. The defaulting party  
6 invoking Civil Rule 55(c) bears the burden of demonstrating that  
7 these factors favor setting aside the default. See TCI Group  
8 Life Ins. Plan v. Knoebber, 244 F.3d 691, 696 (9th Cir. 2001).

9 The bankruptcy court based its denial of the Second Motion  
10 to Set Aside Default on the first and second Civil Rule 55(c)  
11 factors. Mr. Jones-Theophilious does not appear to challenge the  
12 bankruptcy court's determinations on either of the first two  
13 Civil Rule 55(c) factors, providing a solid basis for affirming  
14 the decision of the bankruptcy court. Instead, he seeks to set  
15 aside the default by arguing in essence lack of due process and  
16 lack of personal jurisdiction.<sup>12</sup> We address each of his  
17 arguments in turn.

18 1. Lack of due process

19 Mr. Jones-Theophilious first argues that the default should  
20 be set aside because the bankruptcy court violated his right to  
21

---

22 <sup>12</sup> Mr. Jones-Theophilious' arguments are rambling and  
23 confusing. We construe his pro se appeal brief liberally. See  
24 Keys v. 701 Mariposa Project, LLC (In re Keys), 514 B.R. 10, 15  
25 n.3 (9th Cir. BAP 2014) (citations omitted). However, our  
26 indulgence in that regard is not unlimited. "We will not  
27 manufacture arguments for an appellant, and a bare assertion does  
28 not prove a claim . . . . As the Seventh Circuit in [United  
States v. Dunkel, 927 F.2d 955, 956 (7th Cir. 1991)] stated  
aptly: '[j]udges are not like pigs, hunting for truffles buried  
in briefs.'" Greenwood v. FAA, 28 F.3d 971, 977 (9th Cir. 1994).

1 due process by failing to hold a hearing on his First Motion to  
2 Set Aside Default and/or Second Motion to Set Aside Default,  
3 despite his request.

4 "Due process only requires a meaningful hearing appropriate  
5 to the nature of the case." Jordan v. City of Lake Oswego,  
6 734 F.2d 1374, 1376 (9th Cir. 1984), citing Bell v. Burson,  
7 402 U.S. 535, 540 (1971). Within the context of a motion brought  
8 under Civil Rule 55(c), a bankruptcy court "is not required to  
9 set aside the default and may conduct such hearings as it deems  
10 necessary pursuant to [Civil] Rule 55(b)(2)."<sup>13</sup> Kubrick v. FDIC  
11 (In re Kubrick), 171 B.R. 658, 662 (9th Cir. BAP 1994).

12 Stated differently, a bankruptcy court has discretion as to  
13 whether to hold a hearing on a Civil Rule 55(c) motion. Here,  
14 the bankruptcy court exercised its discretion under Civil  
15 Rule 55(b)(2) when it apparently declined to hold a hearing and  
16 ruled on the motion papers with respect to the First Motion to  
17 Set Aside Default and/or the Second Motion to Set Aside Default  
18 filed by a party incarcerated out of state.<sup>14</sup> By exercising  
19 discretion as authorized under Civil Rule 55(b)(2), the  
20

---

21 <sup>13</sup> Civil Rule 55(b)(2) provides, in relevant part, that "the  
22 court **may** conduct hearings or make referrals . . . when to enter  
23 or effectuate judgment . . . ." (Emphasis added.)

24 <sup>14</sup> The Trustee asserted that the bankruptcy court ruled on  
25 the Second Motion to Set Aside the Default at a status conference  
26 held on September 24, 2013. See adv. proc. docket no. 40. We  
27 cannot determine from the docket whether the bankruptcy court  
28 actually held a hearing on the Second Motion to Set Aside the  
Default on that date. Based on our review of the docket, a  
status hearing was scheduled for October 24, 2013, not  
September 24, 2013. See adv. proc. docket no. 30.

1 bankruptcy court did not violate Mr. Jones-Theophilious' right to  
2 due process and did not abuse its discretion. Mr. Jones-  
3 Theophilious' due process argument therefore is without merit.

4 2. Lack of personal jurisdiction

5 "A federal court does not have jurisdiction over a defendant  
6 unless the defendant has been served properly under [Civil  
7 Rule 4] [made applicable through Rule 7004]." Direct Mail  
8 Specialists, Inc. v. Eclat Computerized Tech., Inc., 840 F.2d  
9 685, 688 (9th Cir. 1988). Civil Rule 4 "'should be liberally  
10 construed so long as a party receives sufficient notice of the  
11 complaint.'" Id., quoting United Food & Comm. Workers Union v.  
12 Alpha Beta Co., 736 F.2d 1371, 1382 (9th Cir. 1984). However,  
13 there must be substantial compliance with Civil Rule 4, otherwise  
14 "'neither actual notice nor simply naming the defendant in the  
15 complaint will provide personal jurisdiction.'" United Food,  
16 840 F.2d at 688, quoting Benny v. Pipes, 799 F.2d 489, 492 (9th  
17 Cir. 1986).

18 Mr. Jones-Theophilious contends that the bankruptcy court  
19 lacked personal jurisdiction over him because he was outside the  
20 boundaries/limits of its district, as he was incarcerated in  
21 Puerto Rico. Recognizing the reality that many interested  
22 parties in a bankruptcy case may not be local, bankruptcy court  
23 jurisdiction extends nationwide. See Rule 7004(d) ("The summons  
24 and complaint and all other process except a subpoena may be  
25 served anywhere in the United States."). As noted by Collier's,

26 "United States" is not defined for purposes of the  
27 subsection. Inasmuch as the bankruptcy court is a unit  
28 of the district court by 28 U.S.C. § 151, however,  
"United States" would presumably comprise every  
jurisdiction in which a district court is located,

1 which includes Puerto Rico, Guam and the Virgin  
2 Islands.

3 10 Collier on Bankruptcy ¶ 7004.05 (Alan N. Resnick and Henry J.  
4 Sommer, eds. 16th ed. 2014). Mr. Jones-Theophilious' argument  
5 lacks merit.

6 Alternatively, he asserts that the bankruptcy court lacked  
7 personal jurisdiction over him because the Trustee improperly  
8 served the pleadings on him by sending them via regular mail,  
9 which did not comply with "service of process rules." He does  
10 not provide the specific service of process rule(s) that the  
11 Trustee allegedly failed to follow, but he insists that the  
12 Trustee had to do more than send the pleadings by first-class  
13 mail (e.g., obtain a signature acknowledging receipt).

14 Contrary to Mr. Jones-Theophilious' arguments, the Trustee  
15 properly served the pleadings on him pursuant to Rule 7004.  
16 Rule 7004(b)(1) allows service to be made "by first class mail  
17 postage prepaid . . . [u]pon an individual other than an infant  
18 or incompetent, by mailing a copy of the summons and complaint to  
19 the individual's dwelling house or usual place of abode or to the  
20 place where the individual regularly conducts a business or  
21 profession."

22 Service of a complaint and summons pursuant to Rule 7004(b)  
23 "'is effective to establish personal jurisdiction over the person  
24 of any defendant with respect to a . . . civil proceeding arising  
25 under the Code,' so long as the exercise of jurisdiction is  
26 consistent with the Constitution and laws of the United States."  
27 Morris v. Peralta (In re Peralta), 317 B.R. 381, 386 (9th Cir.  
28 BAP 2004) (citing Rule 7004(f)). "The mailing of a properly

1 addressed and stamped item creates a rebuttable presumption that  
2 the addressee received it. A certificate of mailing raises the  
3 presumption that the documents sent were properly mailed and  
4 received." Id. (citations omitted). See also Jorgenson v. State  
5 Line Hotel, Inc. (In re State Line Hotel, Inc.), 323 B.R. 703,  
6 709 n.5 (9th Cir. BAP 2005) ("The mailbox presumption is that mail  
7 properly addressed, stamped, and deposited in an appropriate  
8 receptacle creates a rebuttable presumption of its receipt, and  
9 service by mail is complete upon mailing. See Rule 7005; [Civil  
10 Rule] 5(b). A presumption of receipt is established by showing  
11 of proper mailing. Mere denial of receipt is insufficient to  
12 rebut the presumption; clear and convincing evidence is  
13 required.") See Moody v. Bucknum (In re Bucknum), 951 F.2d 204,  
14 207 (9th Cir. 1991); In re Peralta, 317 B.R. at 386.

15 Here, the Trustee stated in the proof of service of the  
16 complaint and in his supporting Declaration that he served the  
17 adversary proceeding complaint and the summons on Mr. Jones-  
18 Theophilious via FedEx, next day business delivery, at his **last**  
19 **known address**, the 793 Beatrice Address. The Trustee served  
20 Mr. Jones-Theophilious pursuant to Rule 7004(b)(1), which created  
21 a rebuttable presumption that Mr. Jones-Theophilious received the  
22 pleadings.

23 Mr. Jones-Theophilious claims that the 793 Beatrice Address  
24 is not a "legal address on file with [the] local and regional  
25 government." He alleges that his address of record was  
26 473 Beatrice Avenue, Veguita, New Mexico 87062 ("473 Beatrice  
27 Address"). However, he did not present any evidence showing that  
28 the 793 Beatrice Address was invalid or incorrect or that the



1 473 Beatrice Address was his "address of record." (Notably,  
2 Mr. Jones-Theophilious demonstrated that he received service of  
3 the summons and complaint by filing the First Motion to Set Aside  
4 Default.) He did not provide clear and convincing evidence to  
5 the bankruptcy court to rebut the presumption that he received  
6 the summons and complaint.

7 Mr. Jones-Theophilious further argues that the Trustee  
8 improperly served the pleadings by mailing them to the incorrect  
9 address. As part of his scanty excerpts of record, he provides  
10 copies of envelopes listing his address as P.O. Box 393, Veguita,  
11 NM 87062 and a copy of his driver's license listing his address  
12 as 473 Beatrice Ave., Veguita, NM 87062.

13 We cannot make any factual determinations on evidence that  
14 was not before the bankruptcy court. See Oyama v. Sheehan  
15 (In re Sheehan), 253 F.3d 507, 512 n.5 (9th Cir. 2001) ("Evidence  
16 that was not before the lower court will not generally be  
17 considered on appeal."). We therefore decline to consider these  
18 documents.<sup>15</sup>

19 We also note that Mr. Jones-Theophilious did not submit any  
20 corroborating evidence to the bankruptcy court showing that the  
21 793 Beatrice Address was not his address. Aside from his various  
22 "affidavits" and "declarations," he provided no other documentary  
23 evidence, such as a recent utility bill or a current driver's  
24

---

25  
26 <sup>15</sup> We do note that the Trustee did not file the complaint  
27 against Mr. Jones-Theophilious until May 7, 2013, but the stamps  
28 on the envelopes submitted by Mr. Jones-Theophilious are dated  
between May 16, 2012 and May 25, 2012, and the driver's license  
has an expiration date of December 31, 2012.

1 license.

2 He further contends that the Trustee was required to obtain  
3 a signature acknowledging receipt of the pleadings to effect  
4 service properly. Rule 7004(b)(1) does not set forth such a  
5 requirement. It simply requires the Trustee to send the  
6 pleadings via first-class mail to Mr. Jones-Theophilious'  
7 dwelling, usual place of abode or to a place where "this  
8 individual regularly conducts a business or profession."

9 Because Mr. Jones-Theophilious did not rebut by clear and  
10 convincing evidence the presumption that he received the  
11 pleadings once the Trustee effected service pursuant to  
12 Rule 7004, his arguments again lack merit.

13  
14 **CONCLUSION**

15 The bankruptcy court did not abuse its discretion in denying  
16 Mr. Jones-Theophilious' request to set aside the default against  
17 him. We AFFIRM.